

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 109

Docket No. NY-0353-09-0096-I-1

**Carla I. LaGreca,
Appellant,
v.
United States Postal Service,
Agency.**

June 14, 2010

Debby Szeredy, Newburgh, New York, for the appellant.

Wendy Provoda, Esquire, Windsor, Connecticut, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that dismissed her appeal. For the following reasons, we DISMISS the PFR as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 On August 14, 2009, the administrative judge (AJ) issued the ID dismissing the appeal. Initial Appeal File (IAF), Tab 45 at 1, 7. The ID informed the appellant that it would become final on September 18, 2009, unless a PFR was filed by that date or the Board reopened the case on its own motion. *Id.* at 7. On September 23, 2009, the appellant filed her PFR. PFR File, Tab 1. The Clerk of

the Board informed her that her PFR appeared to be untimely and provided her with an opportunity to submit a motion, supported by a statement signed under penalty of perjury or an affidavit, showing that it was timely or that the time limit should be waived. *Id.*, Tab 2. The appellant filed a motion to accept the PFR as timely and the agency filed a response opposing the motion.* *Id.*, Tabs 5, 6.

ANALYSIS

¶3 The Board's regulation governing the time for filing a PFR states as follows:

Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first.

[5 C.F.R. § 1201.114](#)(d). Consistent with the regulation, the Board has long held that service on a party's designated representative will be imputed to the party. *See, e.g., Laboy v. U.S. Postal Service*, [103 M.S.P.R. 570](#), ¶ 6 (2006); *Lima v. Department of the Air Force*, [101 M.S.P.R. 64](#), ¶ 5 (2006); *Etherton v. Department of the Treasury*, [26 M.S.P.R. 588](#), 590 (1985).

¶4 The appellant argues that her PFR was timely because she received the ID more than 5 days after it was issued and she submitted the PFR within 30 days of receiving the ID. Specifically, she asserts that she did not receive the ID until September 4, 2009, when she retrieved it from her post office mailbox at the Arlington Branch of the Poughkeepsie, New York Post Office. She submitted evidence to support her assertion. She contends that she interpreted the language

* On November 16, 2009, the appellant filed a reply to the agency's response. PFR File, Tab 7. We have not considered the reply because it was filed after the record closed on review and the appellant has not shown that it is based on evidence that was not readily available before the record closed. [5 C.F.R. § 1201.114](#)(i).

in the ID to mean that she had 30 days from her September 4, 2009 receipt of the ID to file a PFR. She indicates that she consulted with her representative, Debby Szeredy, and that Szeredy agreed with her interpretation. Thus, she contends that her September 23, 2009 PFR was timely. PFR File, Tabs 1, 5.

¶5 The appellant has not shown that her PFR was timely because she has not shown that it was filed within 30 days of Szeredy's receipt of the ID. The appellant designated Szeredy as her representative in her appeal form, IAF, Tab 1 at 2, and Szeredy has represented the appellant throughout this appeal. The appeal form stated that the appeal must "comply with the Board's regulations. 5 C.F.R. Parts 1201 and 1209." *Id.* at 1. It further stated that the Board expects familiarity with its regulations, key case law, and controlling court decisions. *Id.* The AJ's Acknowledgment Order similarly informed the parties that they should refer to the Board's regulations in 5 C.F.R. Part 1201 for more detailed information on the Board's procedures, directing them to the Board's website. IAF, Tab 2 at 7. As previously noted, the Board's regulation states that, if the petitioner is represented, the 30-day time period begins to run upon receipt of the ID by either the representative or the petitioner, whichever comes first. [5 C.F.R. § 1201.114\(d\)](#). Szeredy, as the appellant's representative, was required to be familiar with the Board's regulations. *See, e.g., Etherton*, 26 M.S.P.R. at 590-91.

¶6 The ID's certificate of service reflects that it was mailed to Szeredy on August 14, 2009, at her address of record. IAF, Tab 1 at 2, Tab 45 (Certificate of Service). Board precedent and regulations recognize that documents placed in the mail are presumed to be received in 5 days. *See, e.g., Cabarloc v. Department of Veterans Affairs*, [110 M.S.P.R. 695](#), ¶ 7 (2009); *Williamson v. U.S. Postal Service*, [106 M.S.P.R. 502](#), ¶ 7 (2007); [5 C.F.R. § 1201.4\(l\)](#). The appellant has not asserted that Szeredy did not receive the ID or that Szeredy received the ID more than 5 days after its issuance. Thus, the appellant has not shown that her own delay in receiving the ID, whether justified or not, extended the September 18, 2009 deadline for filing a PFR. *See, e.g., Earls v. Department of the*

Treasury, [95 M.S.P.R. 391](#), ¶ 4, *aff'd*, 113 F. App'x 924 (Fed. Cir. 2004); *Etherton*, 26 M.S.P.R. at 590. Accordingly, the appellant's September 23, 2009 PFR was filed 5 days late.

¶7 The Board will waive the filing time limit only upon a showing of good cause for the delay. [5 C.F.R. §§ 1201.12](#), 1201.114(f). To establish good cause, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). The Board will consider the length of the delay, the reasonableness of the appellant's excuse and her showing of due diligence, whether she is proceeding pro se, and whether she has presented evidence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune that prevented her from timely filing her PFR. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶8 Because she asserted that her PFR was timely, the appellant did not specifically ask the Board to waive the filing deadline; nonetheless, we find that she has failed to show good cause for her untimely filing. Absent other factors showing good cause, the Board has declined to excuse even delays that are not particularly lengthy. *See, e.g., Melendez v. Department of Homeland Security*, [112 M.S.P.R. 51](#), ¶ 16 (2009) (declining to waive the deadline for a 3-day delay); *Rivera v. Social Security Administration*, [111 M.S.P.R. 581](#), ¶¶ 7-8 (2009) (declining to waive the deadline for a 5-day delay); *White v. Department of Justice*, [103 M.S.P.R. 312](#), ¶¶ 10-15 (2006) (declining to waive the deadline for a 5-day delay), *aff'd*, 230 F. App'x 976 (Fed. Cir. 2007).

¶9 Further, the appellant was not proceeding pro se and has presented no evidence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune that prevented her from timely filing her PFR. Her inexperience with legal matters and unfamiliarity with Board procedures do not warrant waiving the filing deadline.

Wallace v. Department of Veterans Affairs, [81 M.S.P.R. 88](#), ¶ 5, *aff'd*, 217 F.3d 856 (Fed. Cir. 1999) (Table). Concerning her own delayed receipt of the ID, she has simply cited her hectic schedule and the distance she lives from her post office mailbox. PFR File, Tab 5 at 3. We find that these do not constitute reasonable excuses sufficient to justify her untimely filing. *See, e.g., Hutton v. Department of the Navy*, [56 M.S.P.R. 165](#), 168 (1992) (finding that the appellant's inability to access his post office box on a 24-hour basis did not establish good cause for the untimely filing of his PFR because he had the responsibility for ensuring that he received his mail and he did not explain why he could not have made alternative arrangements if he was having difficulty retrieving his mail).

¶10 Moreover, to the extent that the appellant cites Szeredy's agreement with her incorrect interpretation of the filing deadline as the reason for her delay, she has failed to establish good cause for her untimely filing. The Board's regulations allow parties wide discretion in choosing their representatives, subject only to disqualification for conflict of interest or position. *Walton v. Tennessee Valley Authority*, [48 M.S.P.R. 462](#), 469 (1991); [5 C.F.R. § 1201.31\(b\)](#). Apart from those bases for disqualification, the appellant's choice of representative is personal to her, and she may choose to be represented by an attorney or a non-attorney, at her discretion. *See Walton*, 48 M.S.P.R. at 469. Notwithstanding the choice, however, she remains responsible for the actions or inactions of her chosen representative and cannot avoid the consequences of her choice. *Id.* Thus, any inexperience with legal matters and unfamiliarity with Board procedures on Szeredy's part similarly do not warrant waiving the filing deadline. *See Wallace*, [81 M.S.P.R. 88](#), ¶ 5. In that regard, the appellant has not asserted that she actively monitored her appeal, but that Szeredy thwarted her diligent efforts to pursue her appeal. Thus, she is responsible for any errors by Szeredy in failing to file a timely PFR. *See, e.g., Laboy*, [103 M.S.P.R. 570](#), ¶ 9; *White*, [103 M.S.P.R. 312](#), ¶¶ 11-13; *Huskins v. U.S. Postal Service*, [100 M.S.P.R. 664](#), ¶ 6

(2006); *Haaland v. Department of Energy*, [34 M.S.P.R. 175](#), 176 (1987) (a representative has an affirmative obligation to be familiar with Board deadlines and a representative's erroneous interpretation of a Board regulation is not a reasonable excuse for a delayed filing), *aff'd*, 846 F.2d 77 (Fed. Cir. 1988) (Table); *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981).

¶11 We find that the appellant has failed to show that she exhibited due diligence or ordinary prudence in filing her PFR. Accordingly, we find no good cause for waiving the filing deadline and dismiss the PFR as untimely filed.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the appellant's PFR. The ID remains the final decision of the Board dismissing the appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.